No. 15869

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERS MILLING COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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To the Honorable Albert Lee Stephens, Homer T. Bone and Walter L. Pope, United States Court of Appeals for the Ninth Circuit, San Francisco, California:

Appellant, Albers Milling Company, hereby respectfully petitions for a rehearing in the above-entitled action, and urges the following in support thereof:

I.

Preliminary Statement.

(a) This petition is presented under Rule 23 of this Court and is filed at this time pursuant to a thirty-day extension granted by the Court on October 10, 1958.

(b) On October 6, 1958, the opinion of the United States Court of Appeals for the Ninth Circuit, before

the Honorable James Alger Fee, William Healy, and Oliver D. Hamlin, Jr., was filed in *Fisher Flouring Mills Company v. United States of America,* No. 15819. In the *Fisher* case the Court reversed the United States District Court for the Western District of Washington, Northern Division, to allow refund of the federal transporation taxes in question under facts virtually identical to those involved in the instant case. The Court in these two cases appears to have arrived at diametrically opposite interpretations of Section 3475(a) of the Internal Revenue Code of 1939, as amended, as applied to the given fact situation. Appellant firmly believes that a rehearing should be granted for the reasons hereinafter set forth and respectfully asks that the same be held *en banc.*

II.

In the Interests of Justice to Taxpayers and Government Alike It Is Essential That the Federal Tax Statutes Be Interpreted Uniformly Throughout a Given Circuit.

The possibility of divergent interpretations of a given tax statute between the Courts of Appeals for the various Circuits is a circumstance of which the Court has knowledge. If within each Circuit further differences of interpretation on identical points of law are to arise the problems of the taxpayer in determining his correct share of the tax, and the problems of the Government in collecting the tax and administering the tax laws will become even more cumbersome and perplexing than they now are.

III.

Appellant Urges That the Opinion of the Court Filed September 10, 1958, Be Reconsidered on the Merits, That the Same Be Vacated, and That the Judgment of the District Court Be Reversed.

Appellant respectfully urges further that a rehearing should be granted in order to reconsider on the merits the opinion entered herein, in view of the *Fisher Flouring Mills v. United States* opinion. The opinion in this action and the one in the *Fisher* case each recognize that the interpretation of the statutory phrase "paid within the United States" in Section 3475(a) of the Internal Revenue Code of 1939, as in effect during the period in question, is the fundamental point at issue. In the *Albers* opinion this Court has reasoned that Congress could not have intended this language to be interpreted literally since that would permit avoidance of the tax by all who elected to pay the freight bills outside the United States and would, in effect, nullify the statute. (Opinion, p. 3.) In the *Fisher* case, on the other hand, the Court concluded that the language used by Congress was so clear and so explicit that the tax should apply only where payment was made within the United States and that it was bound to accept this language even though by so doing some tax revenues would be lost to the Government. (*Fisher Flouring Mills v. United States of America,* opinion, pp. 2, 4, 5.)

A long line of substantial authorities has established the proposition that where a statute is clear on its face, and without conflicting internal provisions, the Courts will not resort to external aids for interpretation nor speculate as to what Congress would have intended under various fact situations. The fact that a taxpayer may have secured a tax benefit by conducting his business in

a particular manner under the statute was deemed immaterial. (See cases cited in Appellant's Br. pp. 12-15 and in *Fisher Flouring Mills v. United States of America,* opinion, pp. 5-7, and Footnote 7, including *United States v. Isham,* 17 Wall. 496, 21 L. Ed. 728; *United States v. Leslie Salt Company,* 218 F. 2d 91, affd. 350 U. S. 383, 100 L. Ed. 441; *Crooks v. Harelson,* 282 U. S. 55, 75 L. Ed. 156; *Lewyt Corporation v. Commissioner of Internal Revenue,* 349 U. S. 237, 99 L. Ed. 1029; *Addison v. Holly Hill Fruit Products,* 322 U. S. 607, 88 L. Ed. 1488; *Van Camp & Sons Company v. American Can Company,* 278 U. S. 245, 73 L. Ed. 311; *Gorin v. United States,* 111 F. 2d 712 (C. A. 9).)

In *Lewyt Corporation v. Commissioner of Internal Revenue, supra,* at page 240 the Court said:

> "But the rule that general equitable considerations do not control the measure of deductions or tax benefits cuts both ways. It is as applicable to the Government as to the Taxpayer. Congress may be strict or lavish in its allowance of deductions or tax benefits. The formula it writes may be arbitrary and harsh in its applications. But where the benefit claimed by the Taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the Taxpayer though they represent an unexpected windfall."

In the *Albers* opinion the Court holds that the apparent intent of the statute to collect tax upon the transportation of property within the United States would have been nullified and the tax virtually eliminated if taxpayers were allowed to avoid the tax by paying the freight bills in Canada or in other places without the United States. The Court deemed it necessary, therefore, to interpret

the law to tax amounts paid without, as well as within, the United States.

Appellant respectfully urges that this is not a situation for the application of such a doctrine. Section 3475(a) is not ambiguous in itself and contains no inconsistent provisions, as such. The possibility of nullification, if such can be said to exist, comes only from the manner in which some taxpayers choose to conduct their business.

The tax laws are replete with situations where a person can avoid a tax by conducting himself or his business in a given manner. For example, an American citizen is not taxable upon income earned outside the United States while a foreign resident or, if not a resident, if he is present in the foreign countries during the prescribed period. (I. R. C., Sec. 911.) If a majority of American citizens should move abroad to avoid the tax, Congress would, no doubt, amend the law to tax income earned abroad, but until such an amendment is passed there is no question of the right of any individual to avoid the tax by establishing foreign residence or otherwise complying with the statutory provisions. In fact, the provisions permitting mere presence (as distinct from legal residence) abroad for the prescribed period to qualify were used by so many taxpayers to avoid the tax that Congress later amended the law to limit the exemption of earned income under Section 911(a)(2), Internal Revenue Code, to $20,000 per year. (Sec. 204(a), Technical Changes Act of 1953; Senate Report No. 685, 83rd Cong., 1st Sess.)

Thus Congress has always been alert where circumstances are considered to warrant it to prevent the "nullification" of a taxing statute by the action of individual taxpayers and has responded with specific legislation, in which specific effective dates are prescribed, to correct

the situation. Certainly this duty lies within Congress and not with the Courts.

Many other examples can be cited from the tax laws where taxpayer action could potentially nullify a particular tax, but the Courts have left it to Congress to correct such situations.

In *United States v. Leslie Salt Company,* 218 F. 2d 91 (C. A. 9, 1954), affd. 350 U. S. 383, 100 L. Ed. 441, this Court held that an instrument denominated a "promissory note" was not subject to stamp tax on issuance, since Congress had repealed the tax on "promissory notes" many years before. The Court acknowledged that if Congress had foreseen the development of corporate financing by means of large long-term bank placement loans like these it probably would not have repealed the tax on promissory notes but concluded that it was up to Congress to amend the law if it deemed such action necessary. This conclusion was reached even though the notes in question had many provisions like those of other types of obligation which were deemed taxable. (Appellant's Br. pp. 13-14.)

As pointed out in *United States v. Isham,* 17 Wall. 496, 21 L. Ed. 728, a person could avoid the stamp tax levied upon bank checks drawn in the amount of $20.00 or more by drawing a number of checks, each in an amount less than $20.00. The Court did not suggest that to allow such action would nullify the Stamp Tax Act, but noted that the taxpayer had a perfect right to do this to avoid the tax.

Appellant respectfully submits that the principles enunciated in the authorities cited on pages 3 and 4 of the opinion herein are not applicable to the case at bar. The pertinent provisions of the cited cases for the most part turn upon the interpretation of a statute which contained

within itself contradictory provisions. For example, in *Peck v. Jenness,* 7 How. 612, 12 L. Ed. 84, one section of the Bankruptcy Act stated that the Act should not impair any liens while another section provided for complete discharge of the debtor. The Court determined that the latter section was not intended to destroy the grant of the lien section, and held that the lien remained after the discharge in bankruptcy on the grounds that one part of a statute should not be interpreted to annul another part.

In *Hollander v. United States,* 248 F. 2d 247 (C. A. 2), a tax relief measure was in danger of becoming ineffective through operation of the statute of limitations. The Court refused to let the one provision thwart the other.

In the *Albers* case, however, the statute is plain upon its face. Section 3475(a) specifies the precise terms under which the tax is imposed. No other general provisions of the law conflict with Section 3475(a) to require a tax where under Section 3475(a) it would not be levied.

When Congress decided in 1950 that the law should be changed to tax payments made without, as well as within, the United States, it amended the law effective November 1, 1950. (Appellant's Br. pp. 6, 7.) The opinion herein has the effect of making this amendment retroactive where Congress itself did not do so. (Appellant's Br. p. 16.)

Furthermore, as stated in *Fisher Flouring Mills v. United States,* opinion page 2:

> ". . . where Congress has amended a statute to cover a 'loophole,' the fact that an addition has been required is proof that the prior statute should be given a different construction."

IV.

The Transportation Charges Were "Paid" in Canada.

Appellant respectfully urges that should the Court on rehearing determine that the tax does not apply where payment of the freight was made outside the United States, the payments here in question should be considered as made in Canada. In addition to the argument in Appellant's brief, pages 7-10, the Treasury Department release in Internal Revenue Bulletin 1958-33, August 18, 1958, page 27, issued after briefs were filed, is noted. In this release the question was presented whether transportation charges paid by mailing a check on July 31, 1958, were subject to the transportation tax which was repealed with respect to freight paid on or after August 1, 1958. The Treasury Department ruled in "Answer 2" of the Release that such a payment is subject to the tax since the payment took place when the check was mailed, which was before August 1, saying:

> "Where in the usual course of business a check in payment of the transportation charges is mailed to the carrier, the depositing of the check in the mail constitutes the payment of such charges."

By the same token, physically delivering a check to the agent of the carrier, as was done in this case, should be considered even more definitely consummation of the act of "payment." And this is particularly so with respect to the checks drawn upon and accepted by the drawee bank in Canada. (Appellant's Br. p. 9.)

V.

Conclusion.

Wherefore, Appellant prays that this Court's decision of September 10, 1958, be vacated, that a rehearing be granted *en banc* and, on rehearing, that the judgment of the Court below be reversed.

Respectfully submitted,

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Attorneys for Appellant.

Certificate of Counsel.

We hereby certify that in our judgment the Petition for Rehearing in *Albers Milling Company v. United States of America,* No. 15869, is well founded and that it is not interposed for delay.

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By JOHN H. MAYNARD,